

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

FRANK O'LEARY,

Appellant,

v.

WASHINGTON HORSE RACING  
COMMISSION,

Respondent.

) Case No. RULE-04-0001

)

) FINDINGS OF FACT, CONCLUSIONS OF  
) LAW AND ORDER OF THE BOARD

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I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board GERALD L. MORGAN, Vice Chair, and BUSSE NUTLEY, Member. The hearing was held at the Employment Security Department Work Source Center, 306 Division Street, Yakima, Washington, on September 21, 2004.

1.2 **Appearances.** Appellant Frank O'Leary was present and was represented by Edward Earl Younglove III, of Parr, Younglove, Lyman & Coker, P.L.L.C. Elizabeth Delay Brown, Assistant Attorney General, represented Respondent Washington Horse Racing Commission.

1.3 **Nature of Appeal.** This is an appeal of alleged rule violations of WAC 356-05-380, WAC 356-05-385, and WAC 356-30-130 for denying Appellant permanent status as a seasonal career employee.

1.4 **Timeliness of Appeal.** During the course of the hearing, Respondent raised the issue of timeliness. Respondent contends Appellant accepted a temporary position in 2003, was then aware of the position's temporary designation, and should have raised his concerns at that time. Appellant asserts he filed a rule violation appeal in response to the change in Respondent's policy regarding his leave, which alerted him of his vulnerability to other issues, such as reduction-in-force rights.

1.5 WAC 358-20-040, subsection (1) states an appeal must be received in writing 30 days after:

(e) the employee could reasonably be expected to have knowledge of the action giving rise to a law or rule violation claim under WAC 358-20-020 or the stated effective date of the action, whichever is later.

WAC 358-20-20 states, in part, "[a]n employee who is adversely affected by a violation of the state civil service law."

1.6 In this case, Appellant accepted his temporary appointment in 2003, but he also accrued leave in that year. Based on the conflicting information, it is reasonable to assume Appellant did not know about the adverse impact until January 2004, when he learned his accrued leave was going to be distinguished. Therefore, we conclude Appellant filed a timely appeal with the Personnel Appeals Board on January 28, 2004.

## **II. FINDINGS OF FACT**

2.1 Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC.

1 2.2 Appellant Frank O'Leary worked as a steward for WHRC in eastern Washington for over 20  
2 years and has worked every racing season for at least the past 16 years. The horse racing season  
3 ordinarily occurs between the months of April and September, and Appellant was offered and  
4 accepted employment to work at various meets within that period of time each year. Timesheets  
5 dating back to 1999 reflect the dates worked by Appellant and are undisputed.

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7 2.3 Prior to 2002, WHRC treated racing stewards as non-civil service employees. On March 15,  
8 2002, the Personnel Resources Board (PRB) approved and adopted the specification for the class of  
9 Racing Steward. Subsequently, the WHRC appointed three permanent, seasonal career stewards to  
10 work a full-time schedule at Emerald Downs. WHRC also appointed a seasonal career steward to  
11 work a dual allocation appointment, transferring back and forth between Emerald Downs and Class  
12 C meets in eastern Washington.

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14 2.4 On January 29, 2003, Robert Leichner, Executive Secretary, notified Appellant the WHRC  
15 anticipated offering him a seasonal temporary appointment as a racing steward for Class C meets in  
16 2003. Appellant accepted the temporary appointment and worked the 2003 season.

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18 2.5 Appellant testified that based on the assurance of WHRC's former executive secretary and  
19 the PRB's classification of the Steward positions to civil service, he believed the agency would also  
20 categorize him as a part-time, seasonal career employee.

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22 2.6 Mr. Leichner testified Appellant was assigned a temporary appointment because he worked  
23 specific meets, which typically occur over two or three consecutive dates and not an entire season  
24 like the seasonal career stewards.

1 2.7 Based on the credible testimony, we find Appellant did in fact work part-time as a steward  
2 presiding at eastern Washington meets, while other stewards performed full-time duties at Emerald  
3 Downs. Nevertheless, a preponderance of the evidence has established the recurring need for  
4 Appellant's steward position to work the annual Class C meets in eastern Washington. The  
5 evidence further established the permanent, seasonal career stewards are unavailable to work the  
6 steward duties performed by Appellant due to working at Emerald Downs.

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8 2.8 On December 31, 2003, Mr. Leichner issued Appellant a memo informing him he was  
9 contemplating offering him a temporary racing steward position for the 2004 Class C racing season.  
10 In response to Mr. Leichner's offer of temporary employment, Appellant informed Mr. Leichner, by  
11 letter dated January 11, 2004, that he anticipated working the 2004 season and inquired about his  
12 annual and sick leave status.

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14 2.9 On January 12, 2004, Mr. Leichner acknowledged Appellant's agreement to serve as a  
15 steward for the 2004 season and stated he would confirm the appointment in writing prior to the  
16 start of the season. Mr. Leichner responded to Appellant's leave inquiry as follows:

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18 . . . While your last pay voucher shows accrued leave you are not able to  
19 use or be compensated for that leave until you have qualified as a full  
20 time employee. In order to qualify as a full time employee you would  
21 need to complete six months of continuous service, or if working less  
22 than 40 hours a week, complete twelve months of continuous state  
23 service. While you accrue annual leave for each month of work in 2003,  
24 the balance of this leave is extinguished prior to the beginning of the next  
25 season and considered to have never existed.

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27 2.10 On January 28, 2004, Appellant filed a rule violation appeal with the Personnel Appeals  
28 Board, requesting permanent status as a seasonal career employee.

### III. ARGUMENTS OF THE PARTIES

3.1 Appellant asserts he has worked every racing season dating back to the 1980's, the work has been cyclic in nature with definite beginning and ending timeframes, and he has accrued work hours during a minimum of three months in each consecutive year for at least the past four years. Appellant further argues his cumulative work hours have been in excess of 5,000 hours. Appellant contends the rules regarding seasonal career employment do not require full-time work in order to qualify as a seasonal career employee. In addition, Appellant asserts the agency could reasonably assume a "mutual expectation" for continued employment because he has been available and returned to work each horse-racing season for the past 19 years. Appellant, therefore, asserts he has met the definition of a part-time, seasonal career employee.

Appellant further argues he does not meet the definition of a temporary employee because his position does not fill in for the absence of a permanent employee or exist as a result of an unexpected workload peak, as defined in the rule regarding temporary employment. Appellant also argues DOP approved his temporary appointment based on Respondent's assertion there was an absence of a permanent employee, which has not been the case because he has been the sole employee to work in his position at the Class C meets. Appellant argues he should be granted permanent, seasonal career status.

3.2 Respondent argues Appellant is a temporary employee and not a seasonal career employee. Respondent argues the racing steward appointment is temporary in nature and does not require a permanent employee to preside at Class C meets. Respondent argues the other racing stewards working at Emerald Downs differ from Appellant because they work a specific season, have a set schedule, and work a 40-hour week. By contrast, Respondent asserts Appellant works specific race meet dates, and his hours total less than 1,560 hours in a twelve-month period, which is more consistent with temporary employment than seasonal career employment. In addition, Respondent argues Appellant has not worked a full three months over three consecutive years, and, in some

1 instances, only worked one day in a 30-day period, which does not equate to one full month of  
2 employment for purposes of the rule. Respondent further asserts there is no expectation Appellant  
3 will return to the WHRC each year. Therefore, Respondent argues the WHRC has been operating  
4 in the most sensible way contemplated by the rules and argues Appellant does not meet the  
5 definition of a permanent or seasonal career employee.

#### 6 7 **IV. CONCLUSIONS OF LAW**

8 4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter  
9 herein.

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11 4.2 In an appeal of an alleged rule violation, Appellant has the burden of proof. (WAC 358-30-  
12 170).

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14 4.3 The issue presented here is whether Respondent violated the conditions of WAC 356-05-  
15 380, WAC 356-05-385, and WAC 356-30-130 related to seasonal career employment when  
16 Appellant was appointed as a non-permanent employee.

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18 4.4 WAC 356-05-380 defines seasonal career employees as follows:

19 Incumbents who have been appointed into seasonal career positions  
20 with the mutual expectation of continued employment or employees  
21 who have repeatedly returned to state employment in the same  
22 agency and are granted a seasonal career appointment at the start of  
23 their fourth season of consecutive employment as provided in WAC  
24 356-30-130 (3).

25 4.5 Based on a preponderance of the evidence, we conclude Appellant's lengthy employment  
26 history with the WHRC establishes a reasonable expectation Appellant will return to work each  
racing season.

1 4.6 WAC 356-05-385 includes two work patterns for seasonal career  
2 employment:

- 3 (1) Work in positions, not intermittent in nature nor exempted by status  
4 or the provisions of WAC 356-06-020, which is cyclic in nature and  
5 beginning at approximately the same time each year lasting for a  
6 minimum of five months and a maximum of nine months in any  
7 consecutive twelve-month period; and  
8 (2) Work patterns in positions as in (1) above but lasting for only a  
9 minimum of three months each season and for the past three  
10 consecutive seasons in the same agency.

11 4.7 We conclude Appellant's employment with the WHRC has been cyclic in nature because he  
12 was hired to preside at Class C meets in eastern Washington during the same period of time,  
13 spanning a minimum of three months, year after year. We agree Appellant only works part of the  
14 time; however, the rules do not distinguish between part-time and full-time seasonal career work.  
15 Furthermore, the evidence presented has demonstrated a recurring need for Appellant's position at a  
16 time when the full-time stewards are unavailable to work the Class C meets. As a result, Appellant  
17 has met the criteria for a part-time employee who works an established season.

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19 4.8 WAC 356-30-130 subsection (3) states:

20 An initial appointment into seasonal career employment shall be  
21 from a register or lists; except that employees selected for a fourth  
22 consecutive season of cyclical temporary employment, as provided  
23 in the definition of seasonal career employment, shall be granted a  
24 seasonal career appointment provided they pass a qualifying  
25 examination for the classification in which they are employed.  
26

1 4.9 Appellant has clearly been appointed to his temporary steward position for more than four  
2 consecutive seasons and, in fact, has worked well in excess of the number of seasons required by  
3 the rule.

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5 4.10 Therefore, Appellant has proven Respondent violated the conditions of WAC 356-05-380,  
6 WAC 356-05-385, and WAC 356-30-130.

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9 **V. ORDER**

10 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Frank O'Leary is granted, and  
11 he should be reappointed to his steward position as a permanent, seasonal career employee.

12  
13 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2004.

14  
15 WASHINGTON STATE PERSONNEL APPEALS BOARD

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17 \_\_\_\_\_  
18 Gerald L. Morgen, Vice Chair

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20 \_\_\_\_\_  
21 Busse Nutley, Member